

JUN 5 1987

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No. 86-1659

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONTINENTAL CAN COMPANY,

Petitioner,

v.

ROBERT GAVALIK, *et al.*,

Respondents,

-and-

CONTINENTAL CAN COMPANY, a
member of THE CONTINENTAL GROUP, INC.

Petitioner,

v.

ALBERT JAKUB, *et al.*, on behalf of themselves and
others similarly situated.

Respondents.

**REPLY BRIEF IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

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Note: Please see Petition for a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioner, Continental Can Company.

Petitioner submits this brief in reply to respondents' brief in opposition to the petition for a writ of *certiorari*. As is reviewed in the petition and further elaborated below, there are important and urgent reasons for the Court to grant *certiorari* in this case.

I. Exhaustion

Respondents admit that the circuit courts are in conflict over the legal issue of whether exhaustion is required in an ERISA section 510 (29 U.S.C. §1140) situation. Nonetheless, they seek to ignore the impact of the exhaustion issue by asserting that the underlying collective bargaining agreement (CBA) does not cover the existing dispute. Respondents failed to indicate that another circuit, examining the identical CBA, found the dispute to be covered by it. *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986).

A. The Circuit Conflict Discussed in the Petition Directly Affects This Action.

The respondents admit that there is conflict among the circuits over the issue of whether section 510 claims must be arbitrated. Then they attempt to distinguish on factual grounds the present case from the Seventh and Eleventh Circuit decisions that required plaintiffs to arbitrate section 510 claims.¹ They argue that those decisions are not applicable to this case "because [here] there *were* no pension plan remedies that plaintiffs could invoke." Brief for Respondents in Opposition [hereinafter referred to as *Opp.*] at 11. Standing square in the way of the arguments of the respondents are the actual facts.

In *Mason*, the Eleventh Circuit panel addressed claims against Continental based on section 510 of ERISA that

¹ *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987); *Mason v. Continental Group, Inc.*; and *Kross v. Western Elec. Co.*, 701 F.2d 1238 (7th Cir. 1983).

were virtually the same as those raised by the present respondents. The collective bargaining agreement that provided the arbitration mechanism considered by the Eleventh Circuit was identical to that providing an arbitration mechanism to the respondents here. Both were negotiated between the United Steelworkers, the union representing the plaintiffs in both cases, and the petitioner. Thus the actual facts discredit the basic argument of the respondents in support of their opposition to the granting of a writ by this Court in this action.²

² The respondents also make a number of peripheral assertions that are incorrect: they assert that the governing pension plan does not forbid the behavior complained of by the respondents. The governing Pension Agreement contains terms that forbid the conduct alleged by the respondents. Through collective bargaining, the parties created the terms and conditions of the pension rights at issue here including procedures for the enforcement of pension rights as well as the substantive prohibition contained in section 510: "The company may not fire you or discriminate against you to prevent you from obtaining a pension or deferred vested benefit to which you are entitled under the Plan or keep you from exercising your rights under ERISA." *Petition* at 124a.

The Pension Agreement also provides a remedy for the type of claims made here: "Any differences that may arise between you and the company concerning . . . your entitlement to . . . (a) pension . . . may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement." *Petition* at 120a.

The parties were also mindful of the requirements of ERISA when they negotiated the Pension Agreement. The pension plan is expressly made to conform to ERISA:

The plan has been amended to conform to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and any differences between the provisions of the plan and the present or future requirements of ERISA will be deemed to be resolved in conformance with the requirements of ERISA.

Petition at 119a.

The respondents assert (at 13-14) that the Pension Agreement is separate from the Master Agreement. In fact, the Pension Agreement recites that it is part of the Master Agreement. *Petition* at 118a. Also,

B. These Conflicts Between the Circuits Clearly Warrant This Court's Review.

Respondents also argue that there are additional reasons why this Court should not grant a writ. These arguments suffer from factual deficiencies similar to those of their first argument,³ and they tend to obscure the real importance of this issue. The Eleventh Circuit decision in *Mason* coupled with a recent decision in the federal district court for New Jersey highlight the problems caused by the unresolved question of exhaustion in the context of ERISA.

On June 21, 1985, the Eleventh Circuit dismissed the claims of plaintiffs from a Continental plant located in Alabama for failure to exhaust their arbitral remedies. *Mason* at 1219. On January 15, 1987, the Third Circuit found in this case that plaintiffs from another Continental plant in Pittsburgh, Pennsylvania, did not need to exhaust their arbitral remedies and made a phase one liability determination against Continental. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). On May 28, 1987, Judge Sarokin of New Jersey in a class action involving employees of Continental at plants all over the United

at 119a, Article 23 of the Master Agreement incorporates the Pension Agreement by reference. And the Appeals procedure of the Pension Agreement at 117a expressly provides for taking disputes up "as a grievance in accordance with the applicable provisions of the Master Agreement."

³ The respondents argue that in time the Seventh and Eleventh Circuits may reverse their "incorrect" decisions. They note two district court cases in which the court called into question the decision in *Kross*. They fail to note the recent Seventh Circuit decision in *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) re-affirming *Kross*. Thus there is no immediate likelihood that that circuit will reverse itself.

They also attempt to argue that the legislative history of ERISA demonstrates that the legislators intended to preclude arbitration of ERISA-based claims. This argument is plainly without merit. See the *Petition* at 12-14.

States, including some located in the Eleventh Circuit, also made a phase one determination of liability against Continental. *McLendon v. Continental Group, Inc.*, No. 83-1340 (D.N.J. May 28, 1987) (order and opinion granting Plaintiffs' Motion for Partial Summary Judgment). The court's finding was based on the alleged collateral estoppel effects of the Third Circuit decision in *Gavalik*. The petitioner has incurred extensive litigation and other costs because of the very differences in circuit decisions that this Court should address.

Thus, in spite of the respondents' averments that the differences in circuit positions have little practical effect, this case and other cases against Continental demonstrate the critical nature of the issue. Moreover, as this Court is well aware, Continental's situation is typical of a large number of the companies in America—companies with multiple plants whose employees work under a master collective bargaining agreement that incorporates a pension plan agreement which has been negotiated with a national union.

II. The Statute of Limitations

Respondents claim that every section 510 decision to date has borrowed from state law to arrive at the appropriate SOL, that analogies to either *DelCostello v. Teamsters*, 462 U.S. 151 (1983) or *Wilson v. Garcia*, 471 U.S. 261 (1985) "have nothing to commend them" or make "no sense", and that the Supreme Court has no interest in examining "a question of state law" as to which the District Court and the Third Circuit were in "unanimity". *Opp.* at 19-20.

Even if, *arguendo*, state law provides the SOL, the Third Circuit's holding is fatally deficient. As shown in the Petition, the Third Circuit's interpretation of Pennsylvania law is in direct conflict with all state court decisions on the issue, and with two prior Third Circuit opinions. Respondents made no effort to show why this Court, in

the exercise of its supervisory authority, should not compel the circuit to heed current Pennsylvania law and its own precedent in selecting an SOL.

Respondents' opposition ignores the conflict now existing among the courts. *Petition* at 17. This state of confusion is especially damaging where the issues affect industry-based nationwide bargaining agreements.⁴ As matters stand now, workers subject to the same bargaining agreement, even facing the same employer, may nevertheless have rights that differ from jurisdiction to jurisdiction. This confusion, and the improbably long SOL selected by the *Gavalik* court, calling into question employment decisions made many years ago and involving collective bargaining agreements renegotiated every three years, are also in clear conflict with the federal policies of promoting uniformity and rapid conflict resolution where collective bargaining and private settlement of disputes are concerned. None of these points was addressed in respondents' opposition.

A. The Analogy to Federal Discrimination Actions and the Question of the Applicable State Law

It was the district court that first analogized to federal employment discrimination actions under section 1983. *Petition* at 21. After *Wilson*, however, these actions (whether based in employment situations or not) became subject to a two-year SOL in Pennsylvania. *Id.* Moreover, pursuant to the 1978 changes in the Pennsylvania SOL, and as recognized by several Pennsylvania state courts and by the Third Circuit itself on two separate occasions, state law actions for the tort of *interference with or injury to economic rights* (the state law analogy used by the Third Circuit before *Wilson* to determine the SOL in employment

⁴ See, e.g., *Coordinating Committee Steel Companies and United Steelworkers of America*, 78-1 Labor Arbitration Awards (CCH) ¶ 8216 (1978) (Aaron, Arb.) (describing the negotiation process for rule of 65 pension benefits in the steel industry, referring to a similar agreement in the can and aluminum industries).

discrimination claims) became subject to a two-year SOL as well. *Petition* at 24.⁵

Far from being "in unanimity" on the matter of the applicable state law, neither the district court nor the appellate court properly considered the question. The *only* state court decisions discussing the SOL applicable to torts for interference with economic rights unanimously adopt the two year period. *Petition* at 24; *Goodman* at 120, n.2.⁶

In conclusion, the Third Circuit must either adopt an analogy to federal discrimination actions *as such*, in which case *Wilson* imposes a two-year SOL,⁷ or it must follow the *further* analogy espoused by its own precedent to find

⁵ See also *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 n.2 (3d Cir. 1985) (opinion on rehearing en banc) ("Claims for injury to economic rights, as well as for personal injuries, are currently subject to a two year limitation."), *cert. granted*, 107 S. Ct. 568 (1986); *Monkelis v. Scientific Systems Services*, 653 F. Supp. 680 (W.D. Pa. 1987) (two-year SOL applied to employment discharge action) and *Garcia v. Community Legal Services*, 524 A.2d 980 (Pa. Super. Ct. 1987).

⁶ The district court cited to a federal discrimination action only. The *Gavalik* opinion, at 843, cites *Ulloa v. City of Philadelphia*, 95 F.R.D. 109, 114 (E.D. Pa. 1982), which correctly holds that employment discrimination actions must be analogized to wrongful interference with economic rights. *Ulloa*, however, concluded, without analysis or support, that such actions were subject to a 6-year limitation period. This conclusion is directly contradicted by the Third Circuit in *Mazzanti v. Merck and Co.*, 770 F.2d 34 (3d Cir. 1985) and *Goodman*, and by the decisions of the state courts. The single state court decision cited by *Gavalik* expressly states that the SOL was not a matter of dispute. *Petition* at 23, n.14; *Gavalik* at 843 (*Petition* 18a). See also *Garcia v. Community Legal Services*, 524 A.2d 980 (citing *Mazzanti* with approval) and *Monkelis*.

⁷ In *Saint Francis College v. Al-Khazraji*, 55 U.S.L.W. 4626 (U.S. May 18, 1987) (No. 85-2169), this Court affirmed the Third Circuit's refusal to retroactively apply *Wilson* to a section 1981 action, where Third Circuit precedent at the time the action was brought supported a six-year statute. These concerns do not apply in the present action, where there was no precedent upon which the respondents could reasonably have relied. *Petition* at 22, n.13.

the state SOL applicable to federal employment discrimination actions, in which case the two-year statute for injury to economic rights applies.

B. The DelCostello Analogy

While it is true that "state law remains the norm for borrowing limitations periods," *DelCostello* at 171, respondents' quotation of that language does not eliminate the need to analyze whether federal policy requires a federal SOL solution. When "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking" the courts "have not hesitated" to turn to federal law instead. *DelCostello* at 172. Respondents' "argument" blithely ignores that Congress itself drew a close parallel between actions under section 510 and unfair labor practice charges. *Petition* at 18-19. It also ignores the strong federal policies in favor of uniformity and rapid conflict resolution, adopted in *DelCostello* as the basis for applying a short uniform federal statute, that are equally present here, where respondents are attempting to resurrect issues that should have been settled years ago within the grievance mechanism provided by the collective bargaining agreement. Finally, it ignores the broad range of legal actions and fact situations in which courts have applied the period adopted by *DelCostello*.⁸

III. The "Same Decision" Test

With regard to the critical issue of whether defendants in a discrimination action are entitled to present "same

⁸ See, e.g., *Int. Bhd. of Elec. Workers v. Hechler*, 107 S.Ct. 2161 (1987) (Stevens, J., dissenting) (*DelCostello* is applicable to an action against the union only); *West v. Conrail*, 107 S. Ct. 1538 (1987) (for purposes of applying the *DelCostello* SOL there is no difference between an action under the Railway Labor Act or an action under section 301 of the Labor Management Relations Act). See also *Petition* at 20, n.12.

decision" evidence as an affirmative defense in the liability phase of the case, respondents attempt to mischaracterize the "same decision" issue as the "but for" issue. In so doing, respondents totally ignore *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and its progeny and instead rely on two cases of this Court which do not address the issue presented. *Opp.* at 20-21.

Respondents erroneously assert that not a single district or appellate court has embraced the theories petitioner espouses. *Opp.* at 8. In reality, the Third Circuit stands virtually alone both in applying the "same decision" test in the second, or remedial, phase of the case and also in its "a determinative factor" test. The circuit is thus in conflict with *Mt. Healthy* which teaches that plaintiffs must first present evidence establishing that the proscribed factor was a "motivating" or "substantial" factor and that the defendant is then entitled to present "same decision" evidence as an affirmative defense to liability. *Id.* at 285-287.

The other circuits have adopted this Court's *Mt. Healthy* standard in the liability phase of all types of mixed-motive discrimination cases with the exception of the Eighth Circuit and the D.C. Circuit in Title VII cases.⁹

⁹ See, e.g., *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Davis v. State Univ. of New York*, 802 F.2d 638 (2d Cir. 1986); *Whalen v. Roanoke County Bd. of Supervisors*, 769 F.2d 221, 224 (4th Cir. 1985), *aff'd on rehearing*, 797 F.2d 170 (4th Cir. 1986) (*per curiam*); *Peters v. City of Shreveport*, No. 86-4608 (5th Cir. May 26, 1987); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985); *Greenberg v. Kmetko*, 811 F.2d 1057, 1064 (7th Cir. 1987); *Barnes v. Bosley*, 745 F.2d 501, 507 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 2022 (1985), *but see Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (*en banc*); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Brown v. Reardon*, 770 F.2d 896, 905 (10th Cir. 1985); *Thompkins v. Morris Brown College*, 752 F.2d 558 (11th Cir. 1985); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1552 (D.C. Cir. 1984), *but see Toney v. Block*, 705 F.2d 1364, 1370 (D.C. Cir. 1983) (Tamm, J., concurring).

The importance of conducting the "same decision" test as to liability is readily apparent given the deleterious impact which results from a finding of liability. For example, partial summary judgment was recently granted in *McLendon v. Continental*, based on the alleged collateral estoppel effect of the liability holding in *Gavalik*. *McLendon* is a nation-wide class action which like *Gavalik* was filed on behalf of former employees of Continental by counsel retained by the United Steelworkers Union with the union paying costs.

The prejudice to Continental which has accrued is doubly offensive on due process grounds because such a finding of liability can only occur in bifurcated class actions. It is a denial of due process both to foreclose an "affirmative defense" (*NLRB v. Transp. Management Corp.*, 462 U.S. 393, 400 (1983)) and to expose a defendant to a finding of liability in a class action case when such exposure could not have occurred in a non-bifurcated case involving a single plaintiff.

Not only have respondents chosen to ignore *Mt. Healthy*, but their reliance on *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and *Teamsters v. United States*, 431 U.S. 324 (1977) is misplaced. *Franks* and *Teamsters* stand for an undisputed proposition concerning relief to the class after liability is determined. The issue presented here is whether a defendant is entitled to defeat liability by proving before the merits are reached that the "same decision" would have been made. See *Mt. Healthy*, 429 U.S. 274; *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *East Texas Motor Freight Inc. v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) and *Hunter v. Underwood*, 471 U.S. 222 (1985).

Mt. Healthy's "same decision" test is a rule of causation which was not at issue in either *Franks* or *Teamsters* and goes to liability, not damages. Respondents do not contest

that the Third Circuit only permits Continental's "same decision" defense to be presented in the damages phase of the case. They fail to address this issue and argue instead that *Franks* and *Teamsters* were faithfully applied because Continental will be permitted to limit damages to individual respondents. Respondents ignore *Mt. Healthy* since they cannot rebut its application.

This Court should recognize the centrally important fact that the Third Circuit's decision conflicts with the express terms of ERISA. Section 510 makes unlawful employer actions taken "for the purpose of interfering with" the attainment of pension benefits. *Petition* at 100a.

The Third Circuit found liability based on a showing by respondents that the proscribed motive was "a determinative factor." Liability was so found even though petitioner had proved at trial that the "same decisions" would have been made for legitimate business reasons. Therefore, the actions were not taken "for the purpose of interfering with" the attainment of pension benefits.

This Court should grant *certiorari* to reconcile the Third Circuit's conflict with the express terms of the statute and to resolve the Third Circuit's conflict with this Court's decision in *Mt. Healthy*.

Conclusion

For all these reasons, to resolve the conflicts between circuits and with decisions of this Court, the petitioner urges this Court to grant its *Petition* for a Writ of *Certiorari*.

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